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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1832

NELSON G. GROSS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
QUESTIONS PRESENTED FOR REVIEW	2
PROCEEDINGS BELOW	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT:	
A. The Court of Appeals' decision that petitioner was not entitled to coram nobis relief despite evidence of improprieties between jury members and Deputy Marshals which would have entitled petitioner to a mistrial or reversal on direct appeal raises a novel and important question of constitutional law	14
B. The Court of Appeals failure to reverse the District Court's denial of coram nobis relief where the record discloses, at a minimum, the "appearance of evil" is in conflict with controlling case law of this Court and other Circuits	17
C. The Court of Appeals failed to rule on petitioner's claim that he was entitled to coram nobis relief where the integrity of the judicial process was violated by the failure of the Court Officers to report the improprieties to the Trial Court, which claim raises a novel and important question of constitutional law	21
CONCLUSION	23

PAGE

APPENDIX:

A—Decision and Judgment of Court of Appeals A-1

B—Decision of District Court B-1

Cases Cited

Estes v. Texas, 381 U.S. 532 (1965) 20

Gonzales v. Beto, 405 U.S. 1052 (1972) 16

Government of Virgin Islands v. Gereau, 523 F.2d 140 (3rd Cir. 1976) 22

Leger v. Westinghouse Elec. Corp., 483 F.2d 428 (5th Cir. 1973) 19

Mattox v. United States, 146 U.S. 140 (1892) 17, 19

McGraw v. O'Neal, 123 Mo. App. 691, 101 S.W. 132 17

Palmer v. Miller, 60 F.Supp. 710 17

Pekar v. United States, 315 F.2d 319 (5th Cir. 1963) 17, 18

Remmer v. United States, 347 U.S. 227 (1954) 16

Turner v. Louisiana, 379 U.S. 466 (1965) 16

United States v. Betner, 489 F.2d 116 (5th Cir. 1974) 18

United States v. Harry Barfield Co., 359 F.2d 120 (5th Cir. 1966) 18, 19

United States v. Keogh, 391 F.2d 138 (2nd Cir. 1968) 15

United States v. McKinney, 429 F.2d 1019 (5th Cir. 1970) 22

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Petitioner, Nelson G. Gross, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on February 7, 1980.

Opinion Below

The opinion of the Court of Appeals for the Third Circuit is published in *United States* v. *Nelson G. Gross,*

614 F.2d 365 (1980), and is attached hereto as Appendix A (A-1). Said opinion affirmed the unpublished opinion of the United States District Court for the District of New Jersey, *United States* v. *Gross,* No. 73-324 (D.N.J. July 3, 1979). The District Court Opinion is attached hereto as Exhibit B (B-1).

Questions Presented for Review

I. Whether the Court of Appeals erred in affirming the District Court's denial of Petition for Writ of Error *Coram Nobis* where the record disclosed extensive romantic involvement and prejudicial communications between sequestered jurors and officers of the court and where such behavior would have required a mistrial if discovered during the course of trial or a retrial if raised on direct appeal.

II. Whether the Court of Appeals erred in affirming the District Court's determination that petitioner must establish that the verdict of the jury was impermissibly influenced where petitioner was denied a fundamentally fair trial by the overwhelming "appearance of evil" resulting from the conduct of court officers.

III. Whether the Court of Appeals erred in failing to rule on petitioner's claim that the integrity of the judicial process and petitioner's Sixth Amendment rights were violated by the failure of the court officers to report improprieties involving the jury to the trial court.

Proceedings Below

Petitioner, Nelson G. Gross, was convicted on a five-count indictment on March 29, 1974, following a trial of more than 30 days.[1] *United States* v. *Gross,* 375 F. Supp. 971 (D.N.J. 1974), *aff'd,* 511 F.2d 910 (3rd Cir.), *cert. den.,* 423 U.S. 925 (1975). A subsequent motion for a new trial was denied by both the trial court and the Court of Appeals. Defendant Gross was incarcerated from June 2, 1976, until he was paroled on December 10, 1976. His supervision on parole terminated on June 1, 1977.

On or about December 5, 1977, Gross filed a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, or, alternatively, for an order setting aside his conviction pursuant to a petition for writ of error *coram nobis. United States* v. *Gross,* 446 F. Supp. 948 (D.N.J. 1978). A hearing *in camera* was commenced on December 27, 1977, continued on January 10 through January 13, 1978, and concluded on January 16, 1978. Having concluded that the court had jurisdiction over the matter through the vehicle of a writ of error *coram nobis,* the United States District of New Jersey (Honorable Lawrence A. Whipple) nevertheless determined that there was no basis in fact for the issuance of the writ of *coram nobis* nor any factual issue justifying a more extensive hearing and thus denied the petition. 446 F.Supp. at 959.

The District Court's order was vacated and remanded by the United States Court of Appeals for the Third

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[1] Petitioner was charged with conspiracy to defraud the United States, aiding and assisting the filing of a false and fraudulent tax return, obstruction of justice and subornation of perjury in an indictment returned on May 22, 1973.

Circuit in an order dated November 6, 1978. *United States* v. *Gross*, No. 78-1360 (3rd Cir. Nov. 6, 1978), *order reported* at 588 F.2d 824. This Court found present factual issues justifying a more extensive hearing into the matter and suggested that the renewed hearings be open rather than *in camera*.

Accordingly, the District Court held additional hearings at which petitioner Gross was permitted to present evidence in support of his allegations. Said hearings were conducted on March 19th and 20th, 1979, and on April 11, 1979.

On July 17, 1979, the District Court entered an order denying the application for a writ of error *coram nobis* based upon the reasons set forth in the court's opinion filed on July 3, 1979. *United States* v. *Gross*, No. 324-73 (D.N.J., July 3, 1979) (unpublished opinion). The opinion of the District Court was affirmed on February 7, 1980, by the Third Circuit in *United States* v. *Gross*, 614 F.2d 365 (1980).

Statement of the Case

The initial evidence in support of the petition for a writ of error *coram nobis* consisted of the affidavit of former Deputy Marshal Leon Stacey, dated November 18, 1977, and the testimony of Mr. Stacey in the United States District Court for the District of New Jersey. In his affidavit, Stacey asserted that he was attached to the United States Marshal's Office in Newark, New Jersey from July 9, 1971, to September 11, 1976, and included among his duties was the responsibility for sequestered juries.

From the first week in March, 1974, and for a period of approximately three weeks thereafter, Stacey was assigned as the "Day Deputy Marshal" to "oversee" the sequestered jury in the case of *United States* v. *Nelson Gross*. He was on duty from 7:00 A.M. to 7:00 P.M., seven days a week and on weekends he would accompany the jury on their recreational trips. It was during this tour of duty that Stacey developed a romantic relationship with a female juror named Brendalee Kashey. The relationship began after Stacey was informed by Deputy Marshals Samuel Cicchino and Cosmo Alagna, Jr. that Ms. Kashey was attracted to him. Cicchino and Alagna had become friendly with another female juror named Lucy Cramer; indeed, these Deputy Marshals were vying for Cramer's affection. Specifically, Stacey claimed that he was able to meet with Kashey privately and intimately at the Coachman Inn where the jury was sequestered due to the connivance of Deputy Marshals Cicchino and Alagna. Further, he was able to see her more frequently on weekends, particularly on a bus trip. During their discussions, Kashey would complaint about the case and was anxious to have it completed. The relationship between Stacey and Kashey became well-known to individuals in the Marshal's office, and matrons informed Stacey that Kashey was, in fact, infatuated with him and could not wait until the trial was over.

During the last week to ten days of the trial, Stacey was transferred to other duties at the Federal Building but was able to meet with Kashey during this period. According to Stacey, Deputy Marshals Cicchino and Alagna permitted Kashey to leave the jury room at the courthouse in order that Stacey could meet with her while Alagna and Cicchino were "partying" with Lucy Cramer, the other female juror. At the Coachman Inn, both women met and romanced with the three Deputy Marshals in-

volved, either on walks in the motel corridor or in a secluded area where a record player was set up.

Stacey further contended that a few days following the trial, he met with Kashey and they drove to Ming's Chinese Restaurant in Woodbridge, New Jersey where they had dinner, talked and met certain friends of Stacey's. During that evening, Kashey informed Stacey of her confusion regarding her current engagement, her feelings about Stacey, her lack of concern about the *Gross* case during the jury deliberations and other personal problems. Stacey further claimed that after the trial Deputy Cicchino, Lucy Cramer, Brendalee Kashey and Stacey all got together at Stacey's home.

At a later date, Stacey discussed the matter with United States Marshal Hirschman. He informed Hirschman about the "rendezvous at my apartment." They further discussed a relationship between Deputy Marshal Anthony Vitello and other female member of the jury named Maureen. Hirschman told Stacey to keep quiet about the episode.

Stacey asserted that he informed the F.B.I. of these matters during March of 1977. He further informed the F.B.I. that the office motto for sequestered juries was " 'We won another case for the government'." Stacey also maintained that he convinced Kashey that the defendant Gross, as a politician, would never receive a prison term if a guilty verdict were returned.

Former Deputy Marshal Stacey's testimony served both to corroborate and expand upon his allegations contained in his affidavit. He testified that the Deputy Marshals were specifically instructed by Marshal Hirschman to take particularly good care of this jury as United States Attorney Goldstein, who was prosecuting the case, had to

look good in that he might become a federal judge. According to Stacey, Hirschman had instructed that the government had to win the case and Stacey, as a Marshal, considered himself a part of the government's team.

Stacey's testimony also provided further detail concerning the development of his romantic relationship with juror Kashey and the relationship between juror Cramer and Deputy Marshals Alagna and Cicchina. With respect to the conversations between the Deputy Marshals and the jurors concerning the case itself, Stacey testified that Cramer expressed her dislike for the defendant's attorney, and that Kashey complained generally about being in the jury, stressing that she had enough of her own problems and was not interested in "any dam politician."

It was during a Saturday bus trip to South Jersey, in the third week of trial, that Stacey informed Kashey that as Gross was a politician, he would only get "a slap on the wrist." Kashey was upset and indicated that she did not want to be part of the jury nor did she care what happened to the defendant. Stacey further testified that at a subsequent courthouse meeting, Cicchino told Cramer not to worry because Gross was not going to be sent to jail.

Stacey stated that during the trial, Marshal Hirschman removed him from duty because of his relationship with Kashey and because everyone was aware of that relationship and Hirschman did not want the case "blown." In response to a question put forth by the District Court, Stacey contended that he did not bring his romantic involvement to the court's attention during the *Gross* trial because he was told by Hirschman to keep his mouth shut.

Stacey also revealed that during a February 1977 meeting with F.B.I. agents, he talked about the Nelson *Gross* case and told the agents of the involvement with female

jury members. He stated that he further informed the agents that he did not think that Gross received a fair verdict in view of the conduct of the Deputy Marshals.

Deputy Marshal Samuel Cicchino testified that he was informed by Stacey that he (Stacey) was infatuated with one of the jurors and indeed was "falling in love" with a juror named Brenda. Cicchino further testified that he did not report Stacey's infatuation to anyone because he did not take Stacey seriously, but he assumed that Deputy Marshal Anthony Vitello and Chief Bowler had been informed about Stacey's feelings because they told the Marshal and the Marshal subsequently took Stacey off the jury. While Cicchino admitted that he was on the bus trip with the *Gross* jury to Smithville on March 16, 1974, he claimed that he could not recall Stacey being present and that he (Cicchino) did not sit with any juror.

Cicchino admitted that he saw a young female member of the jury several times after the trial. Cramer was the juror whom Stacey had identified as the one over whom Cicchino and Deputy Marshal Cosmo Alagna were vying. Cicchino claims that about one week after the trial he had dinner at Cramer's home, and that he had had a date with her at a softball game and visited her at her place of work.

With respect to the post-trial rendezvous, Cicchino testified that he, Stacey, Cramer and Kashey did, in fact, get together at Stacey's apartment on a Saturday following the trial. He stated that no deception was to be involved in getting Kashey to Stacey's apartment. They were at Stacey's apartment for well over an hour, and after eating and conversation, Cicchino took the women home. Cicchino admitted that this was the only time in his life he had seen a marshal date a juror after a trial in which the juror participated. He further stated that when interviewed concerning the improprieties at the *Gross* trial by the F.B.I., he told them he knew of none.

Catherine Garrity, a matron assigned to the *Gross* jury, testified that on more than one occasion while on duty at the Coachman Inn where the jury was sequestered, Stacey informed her that he liked Kashey and would like to establish a relationship or friendship with her. While Garrity claims that she advised Stacey to stay away from Kashey, Garrity did observe Stacey and Kashey communicating while Stacey was on duty. Garrity testified that she could see that Kashey was becoming infatuated with Stacey as Kashey would inquire about when Stacey would be on duty. Garrity also testified that she informed Marshall Hirschman about Stacey and that a day or two later Stacey was removed from duty with the *Gross* jury.

Linda Kotner, a member of the *Gross* jury, testified that Kashey had told her during the trial that she (Brendalee) thought Stacey was nice and that she was confused at the time because she was engaged. Kotner stated that the cause of confusion was her feelings about Stacey.

Harriet Sica Timpanaro testified that she saw Stacey and a woman named Brendalee (Kashey) at Ming's in the latter part of April, 1974, and that she sat with them for an hour or an hour and a half.

Lucy Cramer, a female member of the jury, testified that during the trial Stacey invited her and other members of the jury over to his apartment after the trial was over. She stated that Stacey liked Kashey and that she knew Stacey had been taken off jury duty because he became too friendly with the jurors, possibly having been told that by Deputy Marshal Vitello. She thought that Stacey's removal was occasioned by his attention to Kashey. She contradicted the testimony of Deputy Marshal Cicchino by stating that on the bus trip to Smith-

ville she rode down seated next to Cicchino. In relating the events concerning the Saturday rendezvous at Stacey's apartment, Cramer both contradicted and corroborated the testimony of Stacey, Cicchino and Kashey concerning this event. Most significantly, she stated that she remembers going to Stacey's apartment but does not remember who arranged it.

Cramer admitted that Cicchino had come to her house a couple of times after the trial, at least once for dinner; that she had dinner with Cicchino after the trial at a restaurant on another occasion; and that in addition, Cicchino came over to visit her at her job.

Deputy Marshal Anthony Vitello testified that he and Chief Bowler were in charge of the *Gross* jury, and that Stacey, Alagna and Cicchino were assigned to assist. During the trial, he was told by one of the matrons that a juror had complained about Stacey bothering her and the matron had mentioned the name "Brenda." He claims he reported this to Marshal Hirschman who said he would take care of it. A day or so later, Hirschman, yelling and screaming, instructed Vitello to remove Stacey from the jury. He states that he never reported the information concerning Stacey to the trial court and he does not know if Hirschman ever reported it.

Vitello denied telling F.B.I. agents in an interview that Deputy Marshals Alagna and Cicchino were involved with a female juror on a sequestered jury and that he (Vitello) reported the same to Hirschman. He further denied telling Assistant United States Attorney Robertson and Justice Department Attorney Speiser that Stacey was removed from his assignment with the *Gross* jury because he was in love with a juror. F.B.I. agents Brennan and Wilson, who interviewed Deputy Marshal Vitello in July, 1977, testified that Vitello had told them that Deputy

Marshals Cicchino and Alagna attempted to develop a relationship with a member of a sequestered jury, and that Vitello had brought this to the attention of the United States Marshal with the idea of having these particular deputies removed from that sequestered jury. The agents further testified that Vitello stated the Marshal refused to act. Agent Brennan testified that he had injuired concerning Deputy Marshal involvement with female members of the sequestered jury as a result of a prior interview with another deputy who had stated that a couple of deputies had benefited as a result of working with the sequestered jury for the *Gross* trial. Both Agents Brennan and Wilson testified to the accuracy of their reports which indicated that Vitello had told them of the Alagna and Cicchino involvement with a female juror. Justice Department Attorney Speiser testified that Vitello had stated in an interview three separate times that Stacey was in love with a juror.

Vitello admitted that Stacey was with the jury on March 16, 1974 (the day of the Smithville bus trip) by virtue of the information contained on the logs, but he could not testified to specifically remembering Stacey being on that trip. While this was the only time in his experience that he had received this type of complaint concerning a Deputy Marshal and felt that such a complaint was unusual, he further felt it was enough to report the matter to the Marshal.

Chief Bowler testified that Vitello was a court security specialist and in charge of the *Gross* jury. He stated that he had heard Hirschman hollering on one occasion and Hirschman kicked Stacey off the jury. He later learned that Stacey was removed for fraternizing with a juror by way of talking too much to that juror and giving her a hard time. He stated that Hirschman later

changed his mind and allowed Stacey back on duty with that same jury.

In contrast, Marshal Carl Hirschman testified that he was the Marshal in 1974 and that Bowler and Vitello were in charge of the *Gross* jury. Hirschman claimed that he was never told that the deputies were acting improperly, and indeed, never removed any Deputy Marshal from jury duty nor did he reinstate any deputy to such duty. He further stated that he had never heard any information concerning a deputy being in love with a female juror. He testified that the policy in the office was to report any impropriety to the trial court and not to the Marshal and he would have immediately reported any such complaint to the court had he received one.

Myrtle Grimm, the forelady of the *Gross* jury, testified that Deputy Marshal Stacey was annoying the female members of the jury. She further testified that Stacey thought that he was in love with Kashey. Kashey, however, did not want to be bothered by Stacey. Mrs. Grimm stated that the other female members of the jury came to her and complained about Stacey. Grimm advised that they should go to Judge Whipple and have Stacey removed from duty. Her co-jurors stated that they would report it to Marshal Hirschman and she presumed that they did. Indeed, Mrs. Grimm testified that they reported to her that they had gone to Hirschman and that Hirschman had stated that he would see to it that Stacey was removed. Only a few days later, Stacey was, in fact, removed. Mrs. Grimm presumed that the incident was reported to Judge Whipple and believed Stacey's removal was the trial judge's doing, that being the only reason she did not make an independent report to the court.

Brendalee Kashey Dworak testified that she never knew Stacey was interested in her and that she only knew

Stacey after one and one half weeks into the trial. In contrast to Garrity's testimony, Kashey admitted that one of the matrons questioned her on the bus one day, saying that Stacey had talked to her (the matron) about Kashey but testified that she told the matron she felt nothing for Stacey. Kashey admitted that, during a recess in the trial, she was engaged in conversation with Kotner, Alexander and Grimm (and possibly Cramer), and during said conversation, it developed that Stacey was bothering these women. She denied ever going to Hirschman with a complaint regarding Stacey. Kashey also denied asking Matron Garrity when Stacey would be returning to duty.

Kashey distinctly remembered that Stacey was on the Smithville bus trip, that Stacey sat with her for a few minutes, and that Cramer sat with Deputy Cicchino for a few minutes. She claimed that she did not converse with Stacey more than to say "hello", and stated that Stacey was annoying on the bus that she ignored him and read a book. She remembers also that Stacey was ultimately removed from duty.

With respect to her relationship with Stacey after the completion of the trial, Kashey testified that she was called by Stacey the day she got home from jury duty. With regard to the Saturday visit at Stacey's apartment, she claimed that she did not know she was going to Stacey's, but did, in fact, end up there with Cramer and Cicchino. Her account of the events of that day varied considerably with the testimony of the other witnesses involved.

Kashey testified that Stacey called her once after that visit, and denied ever going to Ming's Chinese Restaurant with Stacey, or, in fact, to any restaurant with Stacey. She testified that she did not like Stacey in that he was annoying and denied any romantic involvement with any marshal during the course of the trial.

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals' decision that petitioner was not entitled to *coram nobis* relief despite evidence of improprieties between jury members and Deputy Marshals which would have entitled petitioner to a mistrial or reversal on direct appeal raises a novel and important question of constitutional law.

Although recognizing that "[c]oram nobis is a remedy infrequently used, and the case law on it is accordingly sparce," the Court of Appeals below nevertheless held

> The interest in finality of judgments dictates that the standard for a successful collateral attack on a conviction be more stringent than the standard applicable on a direct appeal. Behavior that might clearly require a mistrial if brought to the district court's attention at trial, or a retrial if on direct appeal, might not be sufficient to require coram nobis relief.

United States v. *Gross,* 614 F.2d 365, 368 (3rd Cir. 1980). (A-5).

By so stating, the Third Circuit has created a standard, unsupported by prior judicial decisions, which, when applied to a case such as the one at bar, deprives a defendant relief when he has, by any existing standard, shown that he was deprived a fundamentally fair trial by an impartial jury. The Court of Appeals has suggested that even if the instant petitioner was entitled to a mistrial or a reversal on direct appeal by virtue of the evidence of romantic involvement between female members of the sequestered *Gross* jury and Deputy Marshals, he was not entitled to *coram nobis* relief unless he conclusively establishes the irregularity or invalidity of the proceedings below presumably by, as suggested by the District Court, proving the jury was impermissibly influenced. (B-6).

It is submitted that to place a higher burden on petitioner in his quest for *coram nobis* relief is both unreasonable and unfair. As recognized by the court below, *coram nobis* was the only avenue available to petitioner when he became aware of the irregularities in his trial because he had completed serving his sentence and his parole supervision had terminated. 614 F.2d at 366-367. (A-2).

Clearly, the circumstances of the uncontrollable timing of petitioner's claim for relief which resulted in the petition being considered as a request for a writ of error *coram nobis* should not act against petitioner because his time served can never be returned and, as pointed out in the District Court, the *coram nobis* petition was his only avenue by which to vindicate his rights and ultimately return him to the practice of law. Indeed, the Second Circuit has recognized that "special considerations applicable to *coram nobis*" are *not* applicable where the petitioner could not have possibly made a record on the error claimed during trial. In such cases, *coram nobis* relief is mandated once the fundamental defect is shown. *United States* v. *Keogh,* 391 F.2d 138, 148 n. 9 (2d Cir. 1968).

While the instant petitioner claims that the record below reveals far more than that which the Court of Appeals described as "a simple 'annoyance' of some female jurors and the expression of a romantic interest in one",[2]

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[2] It was petitioner's contention below that Stacey's allegations having been corroborated in many of its important details, the

(Footnote continued on following page)

(A-6), it is submitted that the Third Circuit was likely to have reached a totally contrary decision in this case had the proper standards been applied.

This Court in *Remmer* v. *United States,* 347 U.S. 227, 229 (1954), held that a presumption of prejudice arises in cases in which there is "any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury. . . ." If the *Remmer* standard had properly been applied to the case at bar[3] without the heavier burden allegedly imposed in *coram nobis* cases, it is apparent that the government failed to meet its burden of establishing that the prejudicial communications and romantic relationships did not occur or that, if they did occur, they were harmless, and thus petitioner was entitled to relief. *See Turner* v. *Louisiana,* 379 U.S. 466 (1965); *Gonzales* v. *Beto,* 405 U.S. 1052 (1972).

(Footnote continued from preceding page)

District Court should have found that there was both extensive romantic involvement between more than one juror and more than one Deputy Marshal and discussion between those individuals concerning the case on trial. Under these circumstances, petitioner is clearly entitled to relief. *Remmer* v. *United States, supra.* The District Court concluded, however, that Stacey was not to be believed merely because of the manner in which his affidavit was prepared and because of his motives.

[3] It is further submitted that the court below also improperly applied *Remmer* to the instant case. There having been evidence of prejudicial communications between jurors and Deputy Marshals regarding the guilt or innocence of the petitioner, the presumption of prejudice arose and only thereafter, in assessing whether the government met its burden, would Stacey's credibility have become a factor.

B. The Court of Appeals failure to reverse the District Court's denial of *coram nobis* relief where the record discloses, at a minimum, the "appearance of evil" is in conflict with controlling case law of this Court and other Circuits.

As early as 1892, this Court held that:

> [p]rivate communications, *possibly prejudicial, between jurors and* third persons, or witnesses, or the *officer in charge,* are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.

Mattox v. *United States,* 146 U.S. 140, 150 (1892). (emphasis added).

Following the *Mattox* principle, the United States Court of Appeals for the Fifth Circuit, in *Pekar* v. *United States,* 315 F.2d 319 (5th Cir. 1963), reversed a conviction where the prosecuting attorney engaged in merely social conversation with one or more jurors. In so holding, the Fifth Circuit relied, in part, on the District Court decision in the civil case of *Palmer* v. *Miller,* 60 F.Supp. 710, which quoted the following passage from the opinion in *McGraw* v. *O'Neal,* 123 Mo.App. 691, 101 S.W. 132, 137 (emphasis added):

> "It is the duty of litigants and their attorneys to refrain, while the trial is in progress, from seeking the companionship of jurors during the necessary adjournments and recesses. *They should avoid even the appearance of evil,* and, when it is brought to the attention of the trial judge that any person interested in the result of the cause on trial is attempting to court favor with jurors by any sort of attention, a prompt and sufficient rebuke should be

> administered, and *should it appear that a party or his counsel with improper design has succeeded in bestowing favor on a juror, though it consists of nothing more than social attention, a verdict in favor of the offending party should be set aside.*"

The *Pekar* court went on to note that in a criminal case, "an even stricter standard, if possible, is required . . ." 315 F.2d at 322.

Similarly, in *United States* v. *Betner,* 489 F.2d 116 (5th Cir. 1974), a conviction was overturned where the prosecutor, during a recess, discussed matters other than the case at hand with jurors. The Court held that, "[t]he district court's investigation went no further than to ascertain that the case on trial was not mentioned. *This was insufficient.*" Id., at 118 (emphasis added).

Further, in *United States* v. *Harry Barfield Co.,* 359 F.2d 120 (5th Cir. 1966), the Fifth Circuit reversed a conviction where the president of a corporate taxpayer seeking a refund, conversed with members of the jury about family relationships and other topics not involving the case. The Court of Appeals found that conduct to be prejudicial *per se,* stating:

> That case does suggest that a verdict rendered under such circumstances may be saved if forbidden communciations with jurors are made to appear harmless. *But, as in Pekar, we think the harm is inherent in the deliberate contact or communication which exists under the facts of this case. Every case of this kind turns on its own peculiar facts, but the harm here appears to a degree which may not be overcome; and thus prejudice or harm appears as a matter of law. The conduct here was deliberate and intentional as distinguished from a mere inadvertent or accidental contact involving only an exchange of greeting in order to avoid an appearance of discourtesy.*

Id., at 124 (emphasis added). The Court recognized that reversal was necessary to preserve the integrity of the jury system. *Id. See also Leger* v. *Westinghouse Elec. Corp.,* 483 F.2d 428 (5th Cir. 1973).

While the cases discussed above deal primarily with contact between litigants or their representatives and members of the jury, it is clear that they dispel the notion under which the District Court operated in the instant case and which the Court Appeals affirmed, to wit: that the communication between the third party (here, court officers) and jurors must necessarily concern the case itself to be prejudicial. To the contrary, improper contact between jurors and other individuals is forbidden because

> [i]t is vital . . . that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated.

Mattox v. *United States, supra,* at 149, quoted in *United States* v. *Harry Barfield Co., supra,* at 124.

It is submitted that to conclude, as did the District Court below, that the jury in the *Gross* case passed "upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment" is plainly error, even assuming *arguendo* that the record does not support a finding that discussions between the Deputy Marshals and female jurors during their romantic

trysts did not concern the case before them. This error is particularly severe as there is unrebutted testimony supporting the finding that the conduct of the Deputy Marshals, particularly Stacey's conduct, was deliberate and intended to prejudice the defendant and aid the government in obtaining a conviction in an "important" case.

The Court of Appeals has set a standard that would condone the grossly improper contact engaged in between court officers and jurors—contact which the court below conceded was improper and reprehensible (A-6)—as long as the case on trial is not discussed. It is respectfully submitted that such a standard is unacceptable as it ignores the potential prejudice to the defendant by such contact and is destructive of the jury system. Moreover, the standard is in direct conflict with the decision in the cases discussed above.

At a minimum, it is apparent that the conduct engaged in by the Deputy Marshals created a severe distraction to the female jurors involved and to other jurors, such as Grimm and Kotner, who were aware of the conduct, and the absence of the proper atmosphere is grounds for relief. *See Estes* v. *Texas,* 381 U.S. 532, 540-541 (1965).

C. The Court of Appeals failed to rule on petitioner's claim that he was entitled to *coram nobis* relief where the integrity of the judicial process was violated by the failure of the court officers to report the improprieties to the trial court, which claim raises a novel and important question of constitutional law.

It is petitioner's contention that the absolute duty of the Marshal and his Deputies to report to the court any unpermitted contact with members of the sequestered jury having been violated, petitioner was entitled to the relief requested, not only because of the attendant prejudice to him but also because of the severe impairment of the judicial process in which the trial took place.

The record of the instant case discloses that this was not a situation where court officers merely neglected to inform the trial court of matters which they did not believe merited the involvement of the court, but rather involved a calculated effort on the part of those with responsibility and those jurors involved with the Deputy Marshals to conceal from the court wrongdoings that were tainting the entire proceedings. Indeed, the record reflects that the efforts of the forelady of the jury to contact the court were subverted by members of the Marshal's staff, or perhaps the Marshal himself.

The Court of Appeals found the following facts to have been disclosed at the hearings:

> The forelady believed the matter had been reported to the Trial Judge and that Stacey had been removed on account of his behavior. The matron testified that she reported Stacey to the United States Marshal. In fact nothing was reported to the Trial Judge, however, several witnesses con-

firmed that Stacey had been reported to the Marshal. The Marshal denied knowing about it, while several Deputy Marshals testified that they heard him verbally order Stacey off the Gross jury.

(A-4-5).

Whether or not the matter was ever brought to Marshal Hirschman's attenton and even if Hirchman initially removed Stacey from his assignment with the *Gross* jury, it is submitted that neither would have obviated the need to bring it to the attention of the trial court, which would have undoubtedly made an immediate independent inquiry to determine whether the jury had been tainted to the extent that a continuation of the trial would have denied the defendant his right to a trial by a fair and impartial jury. It is further submitted that even a finding consistent with the one resulting from the *coram nobis* proceedings, *i.e.*, some romantic involvement, would have clearly resulted in a mistrial and petitioner's rights would have been preserved.

The trial court, having had no opportunity to insure the protection of the petitioner's Sixth Amendment rights and exercise its duty "'to protect the integrity of its own processes'", was required to set aside the instant verdict. *Government of Virgin Islands* v. *Gereau, supra,* at 151, *quoting United States* v. *McKinney,* 429 F.2d 1019, 1032-33 (5th Cir. 1970) (Goldbold, J., dissenting), *cert. denied,* 401 U.S. 922 (1971). Both the District Court and the Court of Appeals failed to do so, by denying the writ of error *coram nobis* and, indeed, failed to even address this issue when denying petitioner relief.

CONCLUSION

Based upon the facts of this case and the foregoing arguments and authorities, is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

F. Lee Bailey,
Kenneth J. Fishman,
Attorneys for the Petitioner,
One Center Plaza
Boston, Massachusetts 02108.

[Appendices Follow]

APPENDIX A

Decision and Judgment of the United States Court of Appeals, for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2010

UNITED STATES OF AMERICA

v.

NELSON G. GROSS, *Appellant*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(Crim. No. 73-00324)

Argued January 8, 1980

Before: SEITZ, *Chief Judge*, ADAMS and WEIS, *Circuit Judges*

(Filed February 7, 1980)

F. LEE BAILEY (Argued)
KENNETH J. FISHMAN
Boston, Massachusetts
Attorneys for Appellant

ROBERT J. DEL TUFO
United States Attorney
Newark, New Jersey

On the Brief:

MARYANNE T. DESMOND (Argued)
Chief, Appeals Division

OPINION OF THE COURT

PER CURIAM:

Nelson Gross appeals for the second time the district court's denial of a writ of coram nobis. In the first appeal, we vacated the order of the trial court and remanded for a full evidentiary hearing on Gross's allegations of misconduct on the part of government marshals in their dealings with a sequestered jury.[1] After an extensive hearing the district judge found that a deputy marshal had acted improperly, but that his behavior was neither of such character nor such magnitude as to justify issuance of the writ. We now affirm.

The purported evidence of improprieties was discovered more than two years after the affirmance of Gross's conviction[2] and after his sentence had been served and parole supervision terminated.[3] Consequently, relief under Fed. R. Crim. P. 33 or under habeas corpus, 28 U.S.C. §2255, was not available.

The bases for the petition for writ of coram nobis were statements in an affidavit of Leon Stacey, a former

1. United States v. Gross, No. 78-1360 (3d Cir. Nov. 6, 1978) (unpublished per curiam), *order reported* at 588 F.2d 824.

2. *See* United States v. Gross, 375 F. Supp. 971 (D.N.J. 1974), *aff'd*, 511 F.2d 910 (3d Cir.), *cert. denied*, 423 U.S. 924 (1975). In the previous appeal this court affirmed the district court's holding that it did not have jurisdiction over Gross's Rule 33 motion based on newly discovered evidence, because it was not made within two years of the date of final judgment. *See* United States v. Gross, 446 F. Supp. 948, 952-53 (D.N.J. 1978), *aff'd on this issue*, No. 78-1360 (3d Cir. Nov. 6, 1978). Final judgment has been defined as the date when the appellate court issues its mandate affirming the conviction. United States v. White, 557 F.2d 1249, 1250-51 (8th Cir.), *cert. denied*, 434 U.S. 870 (1977); United States v. Granza, 427 F.2d 184, 185 n.3 (5th Cir. 1970); Casias v. United States, 337 F.2d 534, 356 (10th Cir. 1964); Smith v. United States, 283 F.2d 607, 610 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 938 (1961).

3. Gross was convicted of conspiracy to defraud the United States, aiding and assisting the filing of a false tax return, obstruction of justice, and subornation of perjury. *See id.* His sentence, as later reduced, was to imprisonment for a year and a day. After serving five months of the sentence, he was released on parole, supervision of which ended June 1, 1977. Because he was no longer "in custody" when the present motion was filed, no jurisdiction for habeas corpus existed.

Deputy United States Marshal. Stacey alleged that, while assigned to guard the sequestered jurors, he developed during the first week of the trial a romantic involvement with one of the female jurors which continued until shortly after the trial ended. He further alleged that in the course of his "romancing" he sought to influence her verdict by telling her that the defendant would, if convicted, receive no more than a fine. Two other marshals were claimed to have competed for the affections of another juror and to have attempted similar influence.

At the first hearing on the petition, the district court heard testimony in camera from Stacey, from the current marshal, and from the stenographer employed in preparing the affidavit. The court determined that the manner in which the affidavit was prepared raised doubts as to its credibility,[4] that Stacey's motives were suspect,[5] and "that all allegations of misconduct during the pendency of the trial [were] false."[6]

4. The judge ascertained that Gross had paid all expenses of Stacey's trip from California to New Jersey to prepare the affidavit during the course of a two-day meeting. Stacey had admitted that the wording of the affidavit "was primarily the creation of [Gross]," and that several key statements as well as the name of the juror with whom Stacey allegedly became friendly were supplied by Gross. United States v. Gross, 446 F. Supp. 948, 954 (D.N.J.), *vacated and remanded*, 588 F.2d 824 (3d Cir. 1978).

5. Stacey had been the subject of a magazine story and was to be the protagonist of a book. The alleged improprieties were said to be disclosed at the urging of the author and for the purpose of gaining financial benefit from public attention. Furthermore, there were suggestions of personal animosity between Stacey and other members of the Marshal's service. *Id.* at 954-55.

6. *Id.* at 958.

On the first appeal we concluded that a more extensive hearing was necessary because the district court should not have assumed that once it had "discredit[ed] Stacey's allegations regarding frequent instances of prolonged romantic encounters between himself and a female juror, similar 'trysts' between Marshal Service officers and another female juror, and instances in which he attempted to directly influence the juror's deliberations on Gross's guilt or innocence, there was no necessity for further judicial inquiry into this case." We held that "inasmuch as there was other evidence offered here suggesting romantic involvement between sequestered jurors and the officers of the court assigned to supervise their sequestration, a full evidentiary hearing on the issue of juror prejudice was in order." *United States v. Gross*, No. 78-1360, slip op. at 5 (3d Cir. Nov. 6, 1978), *order reported* at 558 F.2d 824.

At the hearing held pursuant to our remand, testimony was adduced from sixteen witnesses, including five jurors, two deputy marshals, the Chief Deputy Marshal, the former Marshal, a deputy clerk who had been a matron assigned to the jury, two FBI agents who had been involved in investigating the Marshal's office, and four other witnesses. Each relevant witness denied that he or she had heard or observed any discussions that related to the Gross trial between any Deputy Marshal and any juror.

After hearing much contradictory testimony the trial judge concluded that Stacey's story was substantially fabricated, although there was at least this kernel of truth:

> The forelady of the Gross jury testified that Stacey had annoyed certain female members of the jury. A matron assigned to the jury testified that Stacey mentioned his romantic interest in a certain juror.
>
> The forelady believed the matter had been reported to the Trial Judge and that Stacey had been removed on account of his behavior. The matron testified that she reported Stacey to the United States Marshal. In fact nothing was reported to the Trial Judge, however, several witnesses confirmed that Stacey had been reported to the Marshal. The Marshal denied knowing about it, while several Deputy Marshals testified that they heard him verbally order Stacey off the Gross jury.

Because the trial judge is completely competent to sift through testimony and make credibility determinations, and because his findings are not clearly erroneous, we decline the petitioner's invitation to make our own findings of fact. The legal question we must therefore decide is whether the behavior found to have occurred requires the conclusion that Gross should have been granted the writ of coram nobis. To focus this legal issue more clearly, it is whether the annoyance of some jurors by a marshal and the marshal's expression of romantic interest in a specific juror is a sufficient taint on the proceedings to require coram nobis relief.

The interest in finality of judgments dictates that the standard for a successful collateral attack on a conviction be more stringent than the standard applicable in a direct appeal. Behavior that might clearly require a mistrial if brought to the district court's attention at trial, or a retrial if on direct appeal, might not be sufficient to require coram nobis relief.

Coram nobis is a remedy infrequently used, and the case law on it is accordingly sparse. The Supreme Court has held that, as an extraordinary remedy, coram nobis should be considered only in circumstances "compelling such action to achieve justice." *United States v. Morgan*, 346 U.S. 502, 511 (1954). Issuance of the writ has been said to be limited to "those cases where the errors were of the most fundamental character, that is, such as rendered the proceeding 'itself irregular and invalid.'" *United States v. Mayer*, 235 U.S. 55, 69 (1914) (dic-

tum). Moreover, "[a]ny proceeding challenged by the writ is presumed to be correct and the burden rests on its assailant to show otherwise." *United States v. Cariola*, 323 F.2d 180, 184 (3d Cir. 1963).

Quoting from an opinion dealing with a direct appeal of a conviction, Gross argues that he has met his burden of demonstrating irregularity during the course of the trial, so that the burden shifted to the government to prove that the irregularity was harmless:

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Remmer v. United States, 347 U.S. 227, 229 (1954). Assuming that the *Remmer* shift in presumptions applies to these proceedings, we hold that the district court correctly emphasized that the presumption shifts only if the improper contact between the deputy marshal and a juror involved "*the matter pending before the jury*." The matter pending before the jury, we held in *United States v. Boscia*, 573 F.2d 827, 831 (3d Cir. 1978) (interpreting *Remmer*), "is the guilt or innocence of the defendant.||"

The trial judge specifically disbelieved the testimony that Stacey had communicated with a juror regarding the substance of the trial itself. The conduct found to have occurred — however improper and reprehensible — was simply "annoyance" of some female jurors and the expression of a romantic interest in one. Because

this finding is not clearly erroneous, we affirm the district court's conclusion that Gross did not carry his burden of proving that he was unjustly convicted in an "irregular and invalid" proceeding. The judgment of the district court will accordingly be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2010

UNITED STATES OF AMERICA,

vs.

NELSON G. GROSS,

Appellant.

(D. C. Criminal No. 73-00324)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present:

SEITZ, *Chief Judge,*
ADAMS and WEISS, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on January 8, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed July 16, 1979, be, and the same is hereby affirmed.

ATTEST:

THOMAS F. QUINN
Clerk

February 7, 1980

APPENDIX B

Decision of the United States District Court for the District of New Jersey

(Filed—July 3, 1979)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CRIMINAL NO. 73-324

UNITED STATES OF AMERICA,

Respondent,

vs.

NELSON G. GROSS,

Petitioner.

F. Lee Bailey, Esq.
One Center Plaza,
Boston, Massachusetts 02108
Attorney for Petitioner

Robert Del Tufo, Esq.
United States Attorney
By: Mary Ann Desmond,
Chief, Appeals Division
Federal Building
Newark, New Jersey 07101
Attorney for Respondent

WHIPPLE, *Senior Judge.*

OPINION

This Court denied the petitioner's request for the issuance of a writ of *coram nobis* in an earlier opinion *United States* v. *Nelson G. Gross,* 446 F.Supp. 948 (D.N.J. 1978). This denial was vacated and remanded by the Court of Appeals for the Third Circuit. *United States* v. *Nelson Gross,* 3d Cir., No. 78-1360, filed Nov. 6, 1978 (hereinafter, slip opinion). Pursuant to that remand a full evidentiary hearing was held in open court March 19, 1979 and continued March 20 and April 11. Sixteen witnesses testified and oral argument was heard. Having carefully considered the complete record including post hearing memoranda submitted by the parties, this Court is of the opinion that petitioner's claim for relief must be denied.

Petitioner was convicted on a five Count indictment on March 29, 1974. He was found guilty of conspiracy to defraud the United States, aiding and assisting the filing of a false tax return, obstruction of justice, and subornation of perjury. *United States* v. *Gross,* 375 F. Supp. 971 (D.N.J. 1974), *aff'd* 511 F.2d 910 (3d Cir.), *cert. denied,* 423 U.S. 924 (1975). He was sentenced to two years in prison and was fined an aggregate of $10,000.

On September 23, 1976 Mr. Gross' sentence was reduced to one year and one day. Under the applicable Parole Guidelines, he was released from federal custody on December 10, 1976 after serving five months. His period of parole supervision terminated on June 1, 1977.

Because petitioner was no longer in federal custody, this Court previously ruled that he could not seek relief under the provisions of 28 U.S.C. § 2255, but rather that he could, pursuant to 28 U.S.C. § 1651, seek a writ of *coram nobis.* 446 F.Supp. at 952. On appeal the Third Circuit agreed that the extraordinary relief of *coram nobis* may be considered if circumstances compell such action to achieve justice. Slip opinion at 3, *citing; United States* v. *Morgan,* 346 U.S. 502, 511 (1954). Jurisdiction to issue a writ of *coram nobis* is limited to, "those cases where errors [are] of the most fundamental character, that is, such as [to render] the proceeding itself irregular and invalid." *United States* v. *Mayer,* 235 U.S. 55, 69 (1914).

The grounds upon which petitioner seeks relief involve allegations of improper contact between members of the Marshal's service and members of the jury who found Mr. Gross guilty. These allegations arose when Leon Stacey, a former United States Deputy Marshal, stated in an affidavit that during the trial he had become romantically involved with a member of the jury and that he made statements about the case to that juror.[1] A hearing was held *in camera* where Stacey was subjected to direct and cross-examination. After considering his testimony and the circumstances under which he made his allegations this Court concluded that:

> The record before this Court is replete with contradictions and discrepancies in Mr. Stacey's testimony. Additionally, several of Mr. Stacey's allegations are inherently unbelievable. The evidence presented to this Court evinces a strong incentive on Mr. Stacey's part to fabricate this story. Lastly,

[1] This Court believes this allegation to be the only one which merits consideration, because it alone could entitle the petitioner to the relief he seeks. The fact that another juror later did some work for the Marshal's service was fully explored at the hearing. This Court finds that fact to be insignificant and immaterial for purposes of this application.

> the manner in which the affidavit was prepared casts serious doubts as to its credibility and veracity. Having carefully considered all the testimony adduced at the hearing, this Court is of the opinion that Mr. Stacey is not a credible witness, and his allegations as to all material aspects are false.

446 F.Supp. at 955.

On appeal the Third Circuit found no error in the conclusion, "that significant portions of Stacey's affidavit were fabricated," slip opinion at 4.

THE TWO PRESUMPTIONS

At the outset it must be stressed that contrary to the petitioner's argument as stated in his various legal memoranda:

> A legal proceeding is presumed regular, and consequently, the assailant bears the burden of proof to the contrary. *United States* v. *Cariola, supra* at 184. The presumption of regularity is well recognized in the federal courts, and has been considered in ruling on the merits of the petition. *See Ybarra* v. *United States,* 461 F.2d 1195 (9th Cir. 1972); *Bruno* v. *United States,* 474 F.2d 1261 (8th Cir. 1973); *Peterson* v. *Missouri,* 355 F.Supp. 1371 (W.D. Mo. 1973). Thus, in applying for a writ of error coram nobis, the petitioner herein must show, on the face of the pleadings, that an error in fact of a fundamental nature existed at the prior trial. The burden extends to a showing that, if known, the verdict may very possibly be contrary to the verdict actually rendered.

> While the defendant thus bears the burden of overcoming the presumption of regularity in the original trial, a conflicting presumption weighs heavily in his favor. Specifically, where there is alleged juror-third-party contact *on matters germane to the issue before the court,* a presumption of prejudice arises and the Court must thereafter conduct a hearing to determine whether the alleged misconduct occurred. *Remmer* v. *United States,* 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954); *United States* v. *McKinney,* 429 F.2d 1019, 1025 (5th Cir.), *cert. denied,* 401 U.S. 922, 91 S.Ct. 910, 27 L.Ed. 2d 825 (1970).

Gross, supra 446 F.Supp. at 9543. (emphasis supplied).

At the first *in camera* hearing it was determined that the alleged misconduct did not occur insofar as it was "germane to the issue before the Court" at the original trial.

Petitioner now appears to believe he has met his initial burden and that the Government has failed to rebut a presumption of prejudice. In support thereof petitioner cites *Remmer* v. *United States,* 347 U.S. 227 (1934) where it was held:

> In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial *about the matter pending before the jury is,* for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowedge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to

> and hearing of the defendant, that such contact with the juror was harmless to the defendant. *Mattox* v. *United States,* 146 U.S. 140, 148-150, 13 S.Ct. 50, 52-535, 36 L.Ed. 917; *Wheaton* v. *United States,* 8 Cir., 133 F.2d 522, 527.

347 U.S. at 228 (emphasis supplied).

In order to raise the presumption of prejudice petitioner must show tha tthe juror-deputy marshal contact involved "the matter pending before the jury." As stated by the Third Circuit discussing *Remmer, supra* in *United States* v. *Boscia,* 573 F.2d 827 (3d Cir. 1978), "(t)he matter pending before the jury is the guilt or innocence of the defendants." 573 F.2d at 831.

Not all juror-jury attendant exchanges are presumptively prejudicial. Each case must turn on its own facts. *Government of Virgin Islands* v. *Gerneau,* 523 F.2d 140, 154 n. 39 (3d Cir. 1975), *cert. denied,* 424 U.S. 917 (1976). Petitioner's reliance upon *Turner* v. *Louisiana,* 379 U.S. 466 (1965) is misplaced for precisely that reason. In *Turner, supra,* two of the deputies who were assigned to guard the jury were also *key witnesses for the prosecution.* Clearly in that situation there was an abvious presumption of prejudice which did not arise during the Gross trial. While Stacey did allege that he discussed the Gross case with a member of the jury, it has already been determined that he lacked credibility. Furthermore the Third Circuit agreed that Stacey fabricated significant portions of his story. However, the Circuit apparently believed a full hearing was necessary to inquire whether anyone would corroborate the allegation of juror-deputy marshal contact insofar as it may have prejudiced the jury against Mr. Gross.

In *United States* v. *Mayer, supra* it was held that a writ of *coram nobis* could not be entertained at common law in cases of alleged "misbehavior or partiality of jurors." The Third Circuit agreed with my earlier decision; the rule from *Mayer, supra* does not control where "prejudicial communications and extensive romantic involvement between sequestered jurors and officers of the court have been alleged." Slip opinion at 4. However, as the Circuit noted, "(s)uch allegations, *if proved true,* might well render Gross' conviction irregular and invalid." Slip opinion at 4 (emphasis supplied).

Sixteen witnesses testified at the full hearing.[2] The Goverment asked each relevant witness if they heard or observed any discussions of Mr. Gross or the Gross trial between any Deputy Marshal and any juror. Each witness denied that this occurred. The overwhelming weight of the testimony refuted the material aspects of Stacey's allegations. In the absence of any corroboration of these material aspects, petitioner has failed to raise a presumption of prejudice and therefore the Government had nothing to rebut.

The Result of the Full Hearing

Petitioner asserts that proof or even an inference of romantic involvement alone is sufficient to grant the requested relief. He relies upon language in the remand decision of the Third Circuit, when in fact the Circuit

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[2] The witnesses who testified at the full hearing included; five jurors, two Deputy Marshals, a Chief Deputy Marshal, the former United States Marshal, a deputy clerk who had been a matron, two FBI Agents, and four additional witnesses.

only granted petitioner a full hearing. This is evidenced by the statement that:

> Given the *possibility* that officers of the court may have had such contacts with members of the jury in Gross' trial *as to impermissibly influence their verdict,* we are remanding this case to the district court for further inquiry. We conclude that a *full* evidentiary hearing is required to insure that, in the light of all the circumstances, Gross' right to an impartial jury verdict, as well as the integrity of the judicial process, were not prejudiced by the conduct of Marshal Service personnel.

Slip opinion at 6 (citations omitted; emphasis supplied). The concern of both this Court and the Third Circuit is whether the verdict of the Gross jury was impermissibly influenced, not the personal activities of the individual jurors.

Petitioner is correct that contradictory testimony was heard at the full hearing. It appears that Stacey did not fabricate his entire story. The forelady of the Gross jury testified that Stacey had annoyed certain female members of the jury. A matron assigned to the jury testified that Stacey mentioned his romantic interest in a certain juror.

The forelady believed the matter had been reported to the Trial Judge and that Stacey had been removed on account of his behavior. The matron testified that she reported Stacey to the United States Marshal. In fact nothing was reported to the Trial Judge, however, several witnesses confirmed that Stacey had been reported to the Marshal. The Marshal denied knowing about it, while

several Deputy Marshals testified that they heard him verbally order Stacey off the Gross jury. This is a disturbing conflict in testimony.[3] However so, it does not corroborate Stacey's allegation that he discussed the trial or Mr. Gross with a member of the jury.

Stacey's allegations of extensive romantic involvement were discredited at both the initial and full hearing. The juror in question denied it completely.[4] At most there is support for a finding that there may have been a slight romantic interest.[5] Petitioner has failed to prove prejudicial communication or extensive romantic involvement between the jurors and members of the Marshal's service. To grant petitioner's application, this Court would have to infer that because some conflicts in testimony emerged,

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[3] Petitioner believes this conflict entitles him to relief. The weight of the evidence establishes that the matter was reported to the Marshal. Unfortunately this means the testimony of a former United States Marshal cannot be accepted as true. Nonetheless this fact does not entitle Mr. Gross to relief.

[4] Petitioner hints that this denial is entitled to little weight. However, taken together with the other witnesses' testimony, this Court is convinced that Stacey at least overstated and at most completely fabricated his allegations of extensive romance. *See Gross, supra,* 446 F.Supp. at 954-958.

[5] Petitioner asserts that this possibility, when coupled with the fact that some jurors were or about to become related to law enforcement personal is significant. On *voir dire* the jurors were questioned by petitioner about these relationships and none were challenged. True, petitioner could not have known at the time of *voir dire* that a slight romantic interest would possibly develop later, however, even if it did, no showing has been made that this, in and of itself, prejudiced Mr. Gross.

Stacey's entire tale was true. This the Court will not do. From the testimony at the full hearing, it is clear that Mr. Gross was not denied his right to an impartial jury, nor was the integrity of the judicial process compromised.

A full hearing having been conducted and petitioner's various legal memoranda having been considered, this Court hereby denies petitioner's application for the issuance of a writ of *coram nobis*.

Counsel for the Government shall prepare an appropriate order within seven (7) days.

LAWRENCE A. WHIPPLE
Senior Judge, U.S.D.C.

Dated: July 3, 1979.